IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA Plaintiff,	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 96-6395
ERNEST BARKMAN, GRACE BARKMAN, ERN-BARK, INC., BARK-ERN, INC., and E.B. CORP., INC. Defendants.	:	

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION Plaintiff,	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 98-1180
ERNEST BARKMAN, et al. Defendants.	:	

MEMORANDUM-ORDER

GREEN, S.J. **December 17, 1998**

Presently before the court are: 1) the United States of America's Motion for Summary Judgment and Enforcement of the Environmental Protection Agency's ("EPA") Administrative Order; 2) the Pennsylvania Department of Environmental Protection's ("DEP") Motion for Summary Judgment; 3) Defendants' Motion for Summary Judgment on the claim of the United States for penalties under Section 106(b)(1) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9606(b)(1); 4) the United States of America's Motion to Exclude the Report and Testimony of Wallace C. Koster and 5) Defendants' Motion to Strike the Declarations of Frank Klanchar. For the following reasons, the United States of America's Motion for Summary Judgment and Enforcement of the EPA's Administrative Order will be granted; DEP's Motion for Summary Judgment will be granted;

Defendants' Motion for Summary Judgment on the claim of the United States for penalties under Section 106(b)(1) of CERCLA will be denied, and a fine will be imposed against Defendants; the United States of America's Motion to Exclude the Report and Testimony of Wallace C. Koster will be denied for purposes of summary judgment; and, Defendants' Motion to Strike the Declarations of Frank Klanchar will be granted-in-part as to those portions of the declaration which were not made upon personal knowledge.

I. FACTUAL BACKGROUND

Plaintiff the United States brought civil action 96-6395 under CERCLA to recover past and future response costs to clean up a Superfund site known as the Welsh Landfill (the "Site"). Plaintiff DEP brought civil action 98-1180 under CERCLA and Pennsylvania's Hazardous Sites Cleanup Act ("HSCA") also to recover past and future response costs associated with the Site. Defendant Barkman ("Barkman"), along with Defendants Ern-Bark, Inc. ("Ern-Bark") and Bark-Ern, Inc. ("Bark-Ern"), own approximately fourteen (14) acres of land which the EPA has identified as the Site. The Site is located along the Welsh Road and Pennsylvania Route 10, in and adjacent to Honey Brook Township in Chester and Lancaster County, Pennsylvania. Defendant Grace Barkman is also a current owner of portions of the Site. Barkman is the president and sole shareholder of each of the corporate defendants, Ern-Bark, Bark-Ern and E.B. Corp, Inc. ("E.B. Corp."). From 1963 to 1976, Barkman operated a landfill on approximately three acres of the Site owned by himself and his wife, and the remainder of the property was never used for disposal or landfill activities. In 1971, Barkman applied to the DEP for a solid waste disposal permit to operate the landfill as a sanitary landfill. Barkman never received the permit, and in 1977 Barkman closed the landfill.

Beginning in 1979, the DEP conducted an investigation of the closed Barkman landfill in response to an alleged complaint regarding possible dumping. In 1980 the DEP, formerly known as Pennsylvania Department of Environmental Resources ("DER"), drilled monitoring wells to check the groundwater. In 1984, the EPA sampled residential wells on and near the Site and found elevated levels of certain volatile chemicals in three of the eight wells which were tested. In September of 1984, the EPA placed the Site on the National Priorities List ("NPL") and designated the Site as a Superfund site.[1]

Thereafter, testing during the mid and late 1980's during the Remedial Investigation ("RI") and Feasibility Study ("FS")[2] at and near the Site revealed hazardous substances, including chloroform, benzene, trichloroethylene, 1, 1-dichloroethane, arsenic, lead, cadmium, and mercury, present in groundwater beneath the Site. (ROD at 10, 16-17, and 19-20.) Testing of surface soils and sediments at the Site revealed elevated levels of polynuclear aromatic hydrocarbons ("PAHs") and metals including arsenic, cadmium, lead, and nickel. (ROD at 10, 16, and 18.) The DEP hired a contractor, SMC Martin, to perform the RI, and SMC concluded that although hazardous substances were present in the soil and groundwater, "human health

[1] The NPL identifies those facilities nationwide at which releases or threatened releases of hazardous substances are found to present the greatest threats to the public health and the environment. See 42 U.S.C. § 9605 (a)(8)(B).

[2] "Feasibility study (FS) means a study undertaken by the lead agency to develop and evaluate options for remedial action. The FS emphasizes data analysis and is generally performed concurrently and in an interactive fashion with the remedial investigation (RI), using data gathered during the RI." 40 C.F.R. § 300.5. "The RI data are used to define the objectives of the response action, to develop remedial action alternatives, and to undertake an initial screening and detailed analysis of the alternatives. The term also refers to a report that describes the results of the study." Id.

risks to the immediate population surrounding the landfill are considered negligible assuming continued satisfactory treatment of ground water supplies, and limited human exposure to the landfill." (RI, December 8, 1998, at EX-5.)

The EPA concluded that SMC Martin's risk assessment was not conducted in accordance with EPA guidelines because SMC did not properly consider all exposure pathways and exposure receptors as required by the EPA guidance document. Therefore, DER contracted with Baker/TSA, Inc. for a risk assessment in accordance with EPA guidance, and Baker/TSA conducted the Public Health Evaluation using the samples collected during the RI supplemented with data collected by the DER during April/May 1989. (Responsiveness Summary, June 1990, at 9.) Baker/TSA submitted the Public Health Evaluation in June of 1990, and EPA states that it was this evaluation that it used as the decision-making document for the purpose of evaluating human health risk. (Responsiveness Summary, June 1990, at 9.) According to the Public Health Evaluation, the hazardous substances found at the Site are human and environmental toxins, as well as known or suspected human carcinogens, and these hazardous substances can affect the nervous system, liver, heart, kidneys, bone marrow, etc. (Klanchar Dec., May 6, 1998, ¶ 9.) Baker/TSA and the EPA concluded that there was a significant risk to human health posed by soils and groundwater in the vicinity of the Site. (Responsiveness Summary, June 1990, at 9; ROD at 32.)

In June of 1990, the EPA set forth the remedial plan for the Site in the ROD for Operable Unit 1 ("OU1"). The EPA called for: 1) the clearing of materials from the surface of the Site; 2) the design and construction of a multi-layer landfill cap over the landfill area to address the source of contamination of the Site; 3) the extension of the Honey Brook Borough water supply

system to nearby residents including those currently receiving bottled water; 4) institutional controls, including land and/or water use restrictions and construction of a six-foot high fence around the perimeter of the landfill to restrict site access; and 5) a focused groundwater study to determine what further action was necessary. (ROD at AR302535-AR302536). The EPA has not yet issued its Record of Decision for the second operable unit ("OU2") which will address the groundwater remedy for the Site.

On March 21, 1991, the EPA issued an Administrative Order ("Removal Order") pursuant to 42 U.S.C. § 9606(a), and the Removal Order became effective on April 2, 1991. Under the terms of the Removal Order, Defendants[3] were to "remove all vehicles, dumpsters . . . that they wish to retrieve for salvage or reuse within sixty (60) days of the effective date of this Order." (Removal Order, March 21, 1991, ¶ 9.1.) The Removal Order did "not require the Respondents to act unless they wish to decontaminate and remove salvageable and reusable materials from the Site. Any such decontamination and removal must be done in accordance with the provisions of this Order." (Removal Order, March 21, 1991, ¶ 12.1.) Barkman agreed to comply with the Administrative Order, (Smillie letter, May 9, 1991), and submitted a work plan which was later approved by the EPA.

On July 1, 1991, the EPA received a letter from Barkman wherein he reported that the rear portion of the Site had been cleared to the point that EPA could begin its initial evaluation of the Site. (Barkman letter, undated, on Twin County Disposal letterhead.) Barkman submitted weekly activity reports, and the EPA extended the deadlines twice for Barkman. Barkman stated

[3] The Removal Order was issued to Ernest Barkman, Grace Barkman, Ern-Bark, Twin County Disposal Company and E.B. Corp.

that his "[f]ailure to achieve the deadline for Phase II removal operations is a function of relocation problems, not a reluctance on Mr. Barkman's part to cooperate with the Agency." (Seng letter, October 3, 1991.) On December 9, 1991, Barkman submitted a "Final Report, Phase I Salvage Removal from Barkman Landfill Superfund Site," prepared by American Resource Consultants, the independent contractor performing the work. After reviewing the report, the EPA notified Barkman that it was aware that Salisbury Township's zoning ordinances would not allow Barkman to relocate his trash hauling business to his property in Salisbury. (McCartney letter, December 10, 1991.) Barkman's counsel requested a sixty (60) day extension for completion of Phase II in order for Barkman to find a location for his business, however, the EPA notified Barkman that he was out of compliance with the April 1, 1992 deadline and no further extensions would be granted. (Smillie letters, December 19, 1990 and January 3, 1991; McCartney response letter, April 9, 1992.)

In a letter dated April 22, 1992, Barkman's counsel requested that the EPA reconsider its position that Barkman was out of compliance and that a reasonable amount of time had been granted for arrangements to be made for Barkman's relocation. (Smillie letter, April 22, 1992.) In that same letter, Barkman's counsel also states that Barkman has substantial cause not to comply with the Removal Order because the proposed remedy may not be appropriate because the EPA had not determined conclusively whether the landfill was the source of the contamination. As of May 18, 1993, Barkman continued to express his desire to complete his efforts to clear and vacate the Site, but he also stated that he wished to remain on the Site as long as possible. (Klanchar Declaration, May 21, 1998, ¶ 10.) The EPA issued a Unilateral Amendment on September 29, 1993 whereby the EPA struck the voluntary language from

paragraphs 9.1 and 12.1 of its first order and mandated that certain materials from the Site be cleared and the Site vacated by November 28, 1993. (Unilateral Amendment, September 29, 1993, ¶¶ 9.1 and 12.1.)

In a letter dated June 10, 1994, Barkman's counsel notified the EPA that Barkman would resume submitting monthly status reports to the EPA, and that "Mr. Barkman will continue to remove all items from the landfill." (Lewis letter and status report, June 10, 1994.) From July 1994 to January 1997, Barkman submitted status reports of the removal activities conducted at the Site and repeatedly stated that removal was progressing and completion was pending. (Klanchar Declaration, May 21, 1998, ¶¶ 12-13 and Exhs. 13 and 14.) On September 13, 1995, Frank Klanchar, EPA's Remedial Project Manager, visited the Site and discovered that contrary to the statements in Barkman's monthly reports, Barkman had significantly expanded his business operations at the Site. (Klanchar Declaration, May 21, 1998, ¶ 14.) On May 21, 1998, Klanchar again visited the Site and observed that an auto salvage and scrap yard was continuing to operate, that livestock were present at the Site and that trucks were moving on and across the landfill area of the Site. (Klanchar Declaration, May 21, 1998, ¶ 13.)

While Barkman was allegedly removing materials from the Site, the EPA continued to work on the municipal water supply project and multi-layer cap remedy for the Site. (Klanchar Declaration, May 21, 1998, ¶ 8.) In addition, a focused ground water study for Operable Unit 2 ("OU2") was conducted by CDM Federal Programs Corporation, which showed that the plume of groundwater contaminated with the hazardous substances extended beyond the boundaries of the area used as a landfill and onto properties owned by Ern-Bark, Inc. and Bark-Ern, Inc. (Klanchar Declaration, May 6, 1998, ¶ 9.) EPA also contracted with the U.S. Army Corps of

Engineers ("USACE") to design the landfill cap to cover the landfill area to address the source of contamination at the Site, and on February 5, 1993, the EPA approved the final design of the landfill cap. USACE had determined that the actual size of the landfill was approximately six acres and the area upon which Defendants landfilled wastes included properties owned by Ernest and Grace Barkman and by Ern-Bark and Bark-Ern. (Klanchar Declaration, August 26, 1998, ¶ 7 and Exh 2.)

In September of 1996, the United States filed civil action 96-6395 to recover past and future response costs. The United States also seeks enforcement of the Removal Order and penalties against the Removal Order Defendants for their failure to comply with the Removal Order. Finally, the United States seeks a declaratory judgment that Defendants are liable for future response costs. The United States's response costs include preparing the final design for the cap and replacing the local residential water supply. The United States alleges that it has incurred $7,010,737.16 in response costs through July 14, 1997, plus $993,426.20 in interest and response costs through March 9, 1998, minus $70,680.00 recovered by EPA, for a total of $7,933,483.36.

Pursuant to a Superfund State Contract between EPA and DEP, DEP is responsible for 10 percent of the capital costs of construction of the EPA-lead response at the Site and 100 percent of the costs of the operation and maintenance of the remedy selected at the Site. (Superfund State Contract, ¶¶ 8.a. and 10.a.) DEP brought civil action 98-1180 against Defendants for that portion of the costs which would otherwise be borne by DEP. In addition, DEP seeks to recover CERCLA costs incurred by DEP related to the temporary provision of bottled drinking water, which costs are independent of the costs incurred by DEP pursuant to the Superfund State

Contract. DEP has also brought this action under Pennsylvania's Hazardous Sites Cleanup Act ("HSCA") which expressly provides for recovery of legal and oversight costs incurred by DEP which may not be available under CERCLA. DEP has accumulated $319,701.27 in contracted costs for the site and $267,536.39 in total accumulated labor expenditures through September 4, 1998. DEP has accumulated an additional $21,852.75 in legal costs through June 30, 1996. The total amount DEP seeks to recover in outstanding response costs, through the relevant dates, is $609,090.41.

II. DISCUSSION

A. Whether Judge Cahn's findings are binding on this court?

On November 5, 1991, a trial was held before Judge Cahn wherein the United States sought a penalty from Barkman for failing to provide information to EPA pursuant to CERCLA. United States v. Barkman, 784 F. Supp. 1181 (E.D. Pa. 1992)("Barkman I"). In Barkman I, Judge Cahn held that Barkman failed to establish that his delay of over 700 days was reasonable and that a fine of $55 per day was an adequate penalty. Id. at 1189-90. Judge Cahn made certain findings of fact to reach this holding including a finding that "[b]ecause of a release of hazardous substances into the groundwater, EPA listed the Site on the National Priorities List ("NPL") in 1984." Id. at 1183.

The United States and DEP argue that issue preclusion bars the Defendants from relitigating the fact that hazardous substances have been released at the Site. Whether Barkman I precludes relitigation of the issue of whether hazardous substances were released from the Site is committed to the court's sound discretion. See Raytech Corp. v. White, 54 F.3d 187, 190 (3d Cir. 1995). For a party to be estopped from relitigating an issue, the following elements must be

present: (1) the identical issue was decided in a prior adjudication; (2) there was a final judgment on the merits; (3) the party against whom the bar is asserted was a party or in privity with a party to the prior adjudication; and (4) the party against whom the bar is asserted had a full and fair opportunity to litigate the issue in question. Board of Trustees of Trucking Employees v. Centra, 983 F.2d 495, 505 (3d Cir. 1992).

This court concludes that issue preclusion would not apply to the present case. The issue before Judge Cahn in Barkman I was not a question of liability, but rather, whether Barkman failed to comply with information requests under 42 U.S.C. § 9604(e)(5)(B). Although Judge Cahn made a finding that hazardous substances were released from the Site, this finding was peripheral to the central issue of whether Barkman failed to comply. Because the question of liability was not before Judge Cahn, this court concludes that Defendants did not have a full and fair opportunity to litigate the question of whether hazardous substances were released from the Site in Barkman I. Therefore, issue preclusion would not apply, and this court will determine the issue of liability under CERCLA and HSCA in the first instance.

B. The Expert Reports of Wallace C. Koster and Frank Klanchar

Defendants filed a Supplemental Response as to their Technical Review of Administrative Record. In an Order dated July 27, 1998, this court denied Defendants' motion to compel entry upon land for the purpose of sampling EPA wells on the basis that review of the response actions taken by the EPA would be limited to the administrative record. Defendants' expert, Wallace C. Koster ("Koster"), sampled the groundwater notwithstanding this court's Order, and Defendants seek to include for the court's consideration Koster's test results of the water samples as well as his conclusions regarding whether the landfill posed a significant threat

to human health or the environment. The United States filed a Motion to Exclude the Report and Testimony of Koster. In response to the filing of Koster's report, the United States also filed a Supplemental Memorandum which includes a report from their expert, Frank Klanchar ("Klanchar") dated October 23, 1998. Defendants, then, filed a motion to exclude all declarations of Klanchar submitted by the United States on the basis that certain portions of the declarations were made on "information and belief" as opposed to personal knowledge.[4]

Section 113(j) of CERCLA provides that "judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court." 42 U.S.C. § 9613(j)(1). Furthermore, "the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law." Id. at subsection (j)(2). Even where review would otherwise be limited to the arbitrary and capricious standard, there are four exceptions where a court's review may exceed the bounds of the administrative record: 1) judicial review is frustrated because the record fails to explain the agency's actions; 2) the record is incomplete; 3) the agency failed to consider all relevant factors; or 4) there is a strong showing that the agency engaged in improper behavior or acted in bad faith. Elf Atochem North America, Inc. v. United States, 882 F. Supp. 1499, 1502 (E.D. Pa. 1995).

Defendants have not established that any of the enumerated exceptions applies in the

[4] Rule 56(e) of the Federal Rules of Civil Procedure requires that "[s]upporting and opposing affidavits shall be made on personal knowledge . . . ." Fed. R. Civ. P. 56(e).

present case, therefore, this court will base its decision solely on the administrative record. This court will, however, consider the reports of the parties' experts as background information to aid the court's understanding and to determine if the agency examined all relevant factors or adequately explained its decision. See United States v. Akzo Coatings of Am., Inc., 949 F.2d 1409, 1427-28 (6th Cir. 1991)(holding court could consider materials outside the administrative record to determine adequacy of agency's decision, but not to determine whether the decision was the best one available). The court will only use the reports of the parties' experts to evaluate whether the record supports the EPA's decision, and this will not change the scope of review from review on the administrative record to a trial de novo.

On issues related to liability, however, this court will not be limited to a review of the administrative record. Liability issues are to be decided by the court, not the EPA, and the court may not give deference to the EPA's finding of statutory liability. See Kelley v. EPA, 15 F.3d 1100, 1106-07 (D.C. Cir. 1994). Therefore, as this court will be deciding issues of liability in the first instance, the court may consider evidence submitted by the parties outside of the Administrative Record as enumerated in Federal Rule of Civil Procedure 56 in deciding a motion for summary judgment. Thus, this court will consider all reports of Koster and Klanchar submitted by the parties as they relate to any issues of liability. Furthermore, in accordance with Rule 56(e) of the Federal Rules of Civil Procedure, this court will only consider those portions of the declarations of Koster and Klanchar which were made upon personal knowledge or would otherwise be admissible into evidence.

Defendants also argue that the Administrative Record is not admissible on summary judgment and Plaintiff's Exhibits 1 through 17 cannot properly support its motion for summary

judgment. Defendants fail to offer any support for this argument. As the Administrative Record would be admissible at trial as a public record under Fed. R. Evid. 803(8) or a business record under Fed. R. Evid. 803(6), the Administrative Record is admissible on summary judgment, and this court will consider the Administrative Record for purposes of the present motion.

C. Liability under CERCLA

Summary judgment shall be awarded "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute regarding a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The evidence presented must be viewed in the light most favorable to the non-moving party. Lang v. New York Life Ins. Co., 721 F.2d 118, 119 (3d Cir. 1983).

CERCLA § 107(a) states, in pertinent part, that:

> subject only to the defenses set forth in subsection (b) of this section --
> (1) the owner and operator of a . . . facility, [and]
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
> . . .
> (4) . . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for --
> (A) all costs of removal or remedial action incurred by the United States or a State . . . not inconsistent with the national contingency plan; [and]
> . . .
> © damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing

> such injury, destruction, or loss resulting from such a release; and
>
> (D) the costs of any health assessment or health effects study carried out under section 9604(I) of this title.
>
> The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D).

42 U.S.C. § 9607(a). A § 107 cost recovery action under CERCLA imposes strict liability on responsible parties. United States v. Alcan Aluminum Corp., 964 F.2d 252, 259 (3d Cir. 1992).

To establish Defendants' liability for the Site, the United States and DEP must show: (1) that hazardous substances were disposed of at a "facility"; (2) that there has been a "release" or "threatened release" of hazardous substances from the facility into the environment; (3) that the release or threatened release has required or will require the expenditure of "response costs"; and (4) that the defendant falls within one of four categories of responsible parties. United States v. CDMG Realty Co., 96 F.3d 706, 712 (3d Cir. 1996). If these requirements are met, responsible parties are liable for response costs regardless of their intent. Id. The only defenses to liability under § 107(a) are if a person otherwise liable can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by (1) an act of God, (2) an act of war, or (3) an unforeseeable act of an unrelated third party in spite of due care. See 42 U.S.C. § 9607(b).

1. Whether the Site is a "facility" under CERCLA

Defendants argue that they never admitted that the entire Site, as defined by the EPA to include 14 acres, is a "facility." (See Barkman Amended Answer ¶ 11.) Defendants contend that while § 101(9)(A) defines a landfill as a facility, there is nothing in the language that allows the EPA to arbitrarily annex all of the Barkman land as part of the Site. Defendants argue that the

entire Site is not a "facility" because the ROD stated that the boundaries of the contamination were unclear.

CERCLA defines a facility as a "landfill" or "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." See 42 U.S.C. § 9601(9)(A)and (B). CERCLA's regulations define "Onsite" to mean "the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action." 40 C.F.R. § 300.5. Defendants admit that part of the Site was used as a landfill. The ROD also establishes that hazardous substances have been found in the soil, monitoring wells and residential wells at or near the Site. The focused groundwater study for OU2 showed that the plume of groundwater contaminated with the hazardous substances extended beyond the boundaries of the area used as a landfill and onto properties owned by Ern-Bark, Inc. and Bark-Ern, Inc. Finally, USACE found the actual size of the landfill to be approximately six acres and the area upon which Defendants landfilled wastes included properties owned by Ernest and Grace Barkman and by Ern-Bark and Bark-Ern.

The first element of a prima facie case of CERCLA liability is that the site in question is a CERCLA facility. Based on the definition of a "facility" as provided in § 101(9)(A) and (B), the Site would constitute a facility because portions of it were used as a landfill and because hazardous substances have come to be located on it. Defendants argue that the entire Site should not constitute a facility, however, Defendants fail to cite any case law to support an argument that the United States must prove that the entire area of a given site is contaminated or is a landfill. To the contrary, the Code of Federal Regulations allows the EPA to define the Site to include areas close to the contamination. Therefore, the first element of a prima facie case of liability

under CERCLA has been met.

2. Whether there has been a "release" or "threatened release" of hazardous substances from the facility into the environment?

Although Defendants do not dispute that hazardous substances are located at the Site, Defendants argue that the EPA made no effort to link the alleged contaminants to the landfill or any other source because the EPA never bothered to test the landfill. Defendants also argue that the EPA failed to investigate whether other businesses could have been the cause of any contamination in the area. Finally, Defendants' expert concludes that the concentration level of hazardous materials shown in the governments 1989 and 1990 test results indicate that the sources of the pollution took place off of the Barkman landfill such that the landfill could not have been the source of contamination because the highest levels of contamination were outside the boundary of the Barkman landfill. (See Koster Report, September 27, 1998, at p. 2.)

Because liability under § 107 of CERCLA is strict, liability is not dependent on any showing of causation or fault. Farmland Industries, Inc. v. Morrison-Quirk Grain Corp., 987 F.2d 1335, 1339 (8th Cir. 1993). The term "release" includes "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." 42 U.S.C. § 9601 (22). As set forth above, the United States has presented evidence that hazardous substances were present at the Site and the plume of groundwater contaminated with the hazardous substances extended beyond the boundaries of the area used as a landfill and onto properties owned by Ern-Bark, Inc. and Bark-Ern, Inc. Defendants do not dispute the test results in the ROD except to argue that the contamination could have come from somewhere else. The Defendants, however, have not produced any

evidence to contradict the government's evidence or to raise a significant question of fact that any of the enumerated defenses to the strict liability imposed under CERCLA apply to the present case. Thus, this court concludes that the presence of hazardous substances at the Site and in surrounding soils and groundwater constitutes a "release" within the meaning of § 101(22) of CERCLA.

Defendants have raised two other arguments on the issue of liability. First, Defendants contend that certain PAHs identified by the EPA as hazardous substances should be excluded under the "petroleum exception" which applies to materials such as refined petroleum products. This argument has no effect on the court's conclusions on the issue of liability as Defendants do not dispute that the Site is contaminated with more types of hazardous substances than PAHs. Defendants also argue that all of the organics found in the residential wells occur in household products, and the residential disposal of household products into the septic systems is the more likely explanation of their occurrence. This argument is also without merit as Defendants have failed to set forth sufficient evidence to create a genuine issue of material fact that the contamination was caused solely by a third party.

3. Whether the release or threatened release has required or will require the expenditure of "response costs"?

Defendants do not dispute that the United States and the DEP have incurred response costs.

4. Whether each defendant falls within one of four categories of responsible parties?

CERCLA § 107(a)(1) "unequivocally imposes strict liability on the current owner of a facility from which there is a release or threat of release, without regard to causation." State of

New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985). Even part owners are jointly and severally liable for the entire amount of response costs at the Site. United States v. Rohm and Haas Co., 2 F.3d 1265, 1279-80 (3d Cir. 1993). Current owners need not have been the owners of the facility at the time that the hazardous substances were disposed of in order to be liable under § 107(a)(1). Shore Realty, 759 F.2d at 1044. "Under CERCLA even an owner that does 'not have control over the disposal activity' is still liable for waste disposed of at its facilities." Elf Atochem North America, Inc. v. United States, 868 F. Supp. 707, 709 (E.D. Pa. 1994). Current operators, even those that are not also current owners, are also liable under § 107(a)(1). United States v. Fleet Factors Corp, 901 F.2d 1550, 1554 at n.3 (11th Cir. 1990).

Defendant Grace Barkman stated in her deposition that she, along with Ernest Barkman, owns the Welsh Road site. (See Dep. Grace Barkman, April 7, 1998, at 9, lns. 10-15.) In the deposition of Ernest Barkman, he admits that he and his wife are share owners of the landfill and that Ern-Bark, and Bark-Ern own properties next to the landfill. (See Dep. of Ernest Barkman, March 18, 1998, at 12, lns. 7-24). The final groundwater study also showed that the groundwater contamination extends under property owned by Ern-Bark and Bark-Ern. (May 6 Klanchar declaration ¶¶ 8-9 & Exhibits 2 & 3). Therefore, Defendants Ernest Barkman, Grace Barkman, Ern-Bark and Bark-Ern are all current owners of a facility from which there is a release or threat of release of hazardous substances.

Defendant E.B. Corp. registered for use of the fictitious trade name E.B. Auto Wrecking with the Pennsylvania State Corporations Bureau on March 22, 1993, which filing was current as of Friday, August 21, 1998. (See August 26 Klanchar Declaration ¶ 12.) Pennsylvania's corporation records show that E.B. Auto Wrecking submitted its address as the address of the

Barkman Landfill Superfund Site. (See August 26 Klanchar Declaration ¶ 12.) Furthermore, Defendants' December 9, 1994 report to the EPA on removal activities at the Site included a receipt showing that E.B. Auto Wrecking had removed 790 passenger tires from the Site on November 25, 1994. (May 21 Klanchar Declaration ¶ 12 & Exh. 13.) The EPA also found that E.B. Corp. was a responsible party under CERCLA in order to issue and apply the Administrative Order to E.B. Corp. (See EPA Unilateral Order ¶ 3.2.) Thus, E.B. Corp. would qualify as a "current operator" at the Site.

The United States and DEP have presented sufficient evidence that each Defendant falls within one of the four categories of responsible parties under § 107, and Defendants have failed to offer any evidence to the contrary. Therefore, the United States and DEP have satisfied the fourth, and final, element of CERCLA liability. As the United States and DEP have satisfied all elements to establish a prima facie case of liability under 42 U.S.C. § 107 and the Defendants have failed to establish any defense to liability, this court will grant summary judgment in favor of the United States and DEP on the issue of liability under CERCLA.

D. Liability under HSCA

Section 701(a) of HSCA provides in pertinent part:

(a) General rule.-- Except for releases of hazardous substances expressly and specifically approved under a valid Federal or State permit, a person shall be responsible for a release or threatened release of a hazardous substance from a site when any of the following apply:

(1) The person owns or operates the site:

(I) when a hazardous substance is placed or comes to be located in or on a site;

(ii) when a hazardous substance is located in or on a site, but before it is released; or

(iii) during the time of the release or threatened release.

35 Pa. Const. Stat. Ann. § 6020.701(a). Under § 702 of HSCA, a responsible person is strictly

liable for response costs "which result from the release or threatened release or to which the release or threatened release significantly contributes." Id. at § 6020.702.

Based on the evidence presented by the United States and DEP on the issue of liability under CERCLA, this court concludes that DEP has also presented sufficient evidence to establish liability under § 701 of HSCA, and Defendants have failed to produce any evidence to establish any exceptions to liability as enumerated in subsection (b) of § 701. Accordingly, this court will grant the DEP's Motion for Summary Judgment on the issue of liability under HSCA.

E. Whether the response actions taken by the United States are and were consistent with the NCP?

The defendants have the burden of showing that the response costs incurred by the EPA are inconsistent with the NCP.[5] United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 747 (8th Cir. 1986). All costs incurred by the government that are not inconsistent with the NCP are conclusively presumed to be reasonable. Id. at 747-48. Because determining the appropriate removal and remedial action involves specialized knowledge and expertise, the choice of a particular cleanup method is a matter within the discretion of the EPA, and the standard of review is whether the EPA's choice is arbitrary and capricious. Id. at 748. Under the arbitrary and capricious standard, the court must review whether the agency has examined the relevant data and has articulated a rational explanation for its action. Eagle-Picher Indus., Inc. v. United States EPA, 759 F.2d 905, 921 (D.C. Cir. 1985).

Defendants concede that they cannot raise a "de minimis" defense to CERCLA liability,

[5] The "National Contingency Plan" is a set of regulations promulgated by the EPA that establishes procedures and standards for responding to releases of hazardous substances, pollutants and contaminants. See 42 U.S.C. § 9605; 40 C.F.R. Part 300 (1995).

but argue that the extent of the contamination is highly probative of whether the EPA's actions were arbitrary and capricious. Defendants cite the original RI done by SMC Martin and the "Final Groundwater Study" prepared by the EPA in 1992 to argue that the air contamination was not significant and the residential wells showed a marked decrease in many of the alleged hazardous substances detected. (See RI at p. EX 3-5; Final Groundwater Study at 4-19.) Furthermore, Defendants refer to the "Revised Final Design Analysis" performed by USACE dated February 1993 which states that sampling indicates "site-wide, low level surface contamination by a variety of polycyclic hydrocarbons (PAHs), that are commonly seen in fuels/petroleum hydrocarbons." (See Army Corps of Engineers, Analytical Investigation Report, at 10.) Defendants argue that the "low level" substances found at the Site may not even be considered "hazardous" under the CERCLA petroleum exception.

This court concludes that the above arguments do not demonstrate that the actions of the EPA and DEP were arbitrary and capricious. The administrative record contains ample evidence that hazardous substances were, and still are, present at the Site, and the risk assessment performed by Baker/TSA supports the EPA's finding that there was a significant risk to human health posed by soil and soil groundwater in the vicinity of the Site. The fact that the level of the hazardous substances has decreased over time does not render the response actions of the EPA and DEP arbitrary and capricious where the record demonstrates that hazardous substances contaminated the ground and water at the time it decided the appropriate response action. Furthermore, the ROD establishes that hazardous substances continue to contaminate the Site.

The petroleum exception that Defendants refer to exempts from the definition of "hazardous substance" certain oil or oil fraction which naturally contains low levels of hazardous

substances. See United States v. Alcan Aluminum Corp., 964 F.2d 252, 266-67 (3d Cir. 1992); see also, 42 U.S.C. § 9601(14). The EPA has stated, however, that materials such as waste oil are not within the petroleum exclusion. Alcan Aluminum Corp., 964 F.2d at 266 (citing 50 Fed.Reg. 13,460 (1985)); see also Dartron Corp. v. Uniroyal Chem. Co., Inc., 917 F. Supp. 1173, 1183 (N.D. Ohio 1996)("spilling 'virgin' motor oil on the ground is not a release of a hazardous waste under CERCLA, but spilling used motor oil . . . almost certainly is."). Where the plaintiff alleges a release or threatened release of hazardous substances, the defendant must controvert the plaintiff's allegations concerning the hazardous composition of the petroleum product in order to take advantage of the exemption. Foster v. United States, 926 F. Supp. 199. 205-06 (D.D.C. 1996); see also Dartron, 917 F. Supp. at 1184 (burden on defendant to show the used oil it spilled did not contain hazardous substances not normally inherent in petroleum).

EPA's project manager, Klanchar, states in his declaration that when he visited the Site on May 21, 1998, Barkman told him that some of the barrels at the Site contained used motor oil. (Klanchar Dec., August 26, 1998, ¶ 10.) Barkman also stated in his deposition that he has handled waste or used oil and motor oil at the Site. (See Barkman Dep., March 18, 1998, at 98, ln. 6 through p. 101, ln. 15.) Because the United States has come forth with evidence that Barkman has handled used or waste oil at the Site, the burden shifts to the Defendants to show that the petroleum substances found at the Site did not contain hazardous substances not normally inherent in petroleum. The only evidence Defendants offer is Barkman's deposition testimony that certain drums, alleged by the EPA to contain hazardous substances, actually contained gasoline. (See Barkman Dep., April 7, 1998, at 130-31). Even assuming that said drums did contain gasoline, Barkman has admitted that other drums at the Site contained waste

oil, and Defendants have not shown that the petroleum substances found at the site did not contain hazardous substances not normally inherent in petroleum. Because Defendants have not carried their burden, any argument the Defendants may raise based on the petroleum exception is meritless. Furthermore, even if Defendants could prove that certain PAHs fit the petroleum exception, such evidence would not render the response actions of the EPA and DEP arbitrary and capricious as Defendants do not dispute that the Site was contaminated with more hazardous substances than PAHs.

Defendants also argue that the new extension of the municipal water system was contrary to the NCP because the EPA relied on incomplete and speculative data to link the contaminants to the landfill. According to the ROD, The EPA found that because the ground water in the vicinity of the Site occurs in a fractured bedrock aquifer, the ground water flow may vary a great deal from the direction of the average gradient causing contaminant migration to occur in any direction. (ROD at 9.) The EPA found that the "ground water system, including the potable water supply, contains volatile organic contaminants including 1,1-dichloroethane, chloroform, benzene, trichloroethylene, tetrachloroethylene, and the metals arsenic, cadmium, lead and mercury. All sampling during the field studies indicated the landfill as the source of contamination." (ROD at 10.) The EPA stated that the DEP provided bottled drinking water to 44 residential structures beginning in March 1989 because residential well sampling completed prior to, and during the RI, showed that elevated levels of site-related contaminants were detected at random intervals and varying concentrations. (ROD at 20.) The EPA concluded that "[w]hile the primary health risks from contaminated well water have been addressed, the residents remain potentially exposed to volatile contaminants when bathing or washing with well water." (ROD at

20.) Based on the findings and conclusions of the EPA, this court concludes that Defendants have failed to demonstrate that the response actions of the EPA and DEP in supplying bottled water to residences and replacing the local residential water supply were arbitrary and capricious.

Defendants argue that the remedial plan is inconsistent with the NCP because the capping remedy does nothing to clean the contaminated groundwater under the Site. The EPA stated that "institutional and containment actions included in the remedy for the first OU will address the principal threats to human health posed by the presence of elevated levels of organic and inorganic contaminants in private wells and landfill soils." (ROD at 7.) The record for OU2 would follow and consist of the remedy selection for cleaning the contaminated ground water. "The remedy for the first OU will allow for the primary health risks to be addressed while the investigation required for the second OU, the contaminated ground water aquifer, proceeds." (ROD at 7.) Thus, the capping remedy in OU1, which is the subject of the present motions, was not intended to clean the contaminated groundwater.

Defendants argue that the cap design is inconsistent with the NCP because the landfill covered only 1.5 acres. EPA's final cap design calls for a multi-layer cap of roughly seven acres with additional land required for a maintenance road, construction staging area, decontamination pad, storm water reservoir, stilling basin, and storm water pipeline for a total of 14.01 acres. USACE determined that the actual size of the landfill was approximately six acres and the area upon which Defendants landfilled wastes included properties owned by Ernest and Grace Barkman and by Ern-Bark and Bark-Ern. Furthermore, less than ten (10) acres of Defendants' property will be required for the project, with the remaining acreage coming from neighboring properties. (Klanchar Dec., August 29, 1998, ¶ 7 & Exhs. 1-3.) Defendants have failed to

demonstrate on the record that the size of the cap is inappropriate.

Defendants also contend that Pennsylvania law does not require the EPA to install a multilayer cap because at most, the cap must be a 1-foot layer of clay. Pennsylvania law requires (1) a cap consisting of a 1-foot layer of clay, (2) a drainage layer, (3) a layer of soil at least 2 feet thick over the drainage layer. 25 Pa. Code § 273.234 (1998). According to the Pennsylvania regulations, the cap, indeed, must be multilayer. Defendant also argue that the multilayer cap was not required because the effective date for the RCRA requirements was November 8, 1986 and the landfill closed in 1977. Defendants contend that Baker/TSA incorrectly assumed that RCRA hazardous waste was placed on the Site after the effective date of the requirements. Even if the court assumes that RCRA hazardous waste was not placed on the Site after the effective date of the requirements, Defendants argument is not persuasive because the question in this action is not whether the capping remedy was required, but rather, whether it was appropriate. Defendants have not established on the record that the capping remedy chosen by the EPA was arbitrary and capricious.

Defendants offer the report of their expert, Koster, who concludes: 1) that the RI found no evidence that any contamination of the groundwater from the landfill affected any domestic wells; 2) that the area delineated by the EPA for remediation is greater than could have resulted from the landfill; 3) that the risk assessment performed by Baker/TSA was not in accordance with the EPA superfund Public Health Evaluation Manual; 4) that Baker/TSA erroneously concluded that the landfill posed a significant health risk; 5) that the appropriate remedy for the landfill would be the “No action with baseline groundwater monitoring-Alternative 1"; 6) that the amount of water supplied to the region is ten times the amount necessary; 7) that the EPA failed

to consider a carbon filter system alternative; 8) that the EPA's decision to use a synthetic cap is arbitrary; and 9) that the EPA improperly considered "nuisance issues" associated with the permitted junkyard located in the center of a developing community in making its remedial decisions. (See Koster Review, September 17, 1998.)

Koster does not dispute the actual findings of the EPA, but rather, the EPA's conclusions about those findings. The fact that another conclusion may be reached from the EPA's findings does not render the EPA's conclusions arbitrary and capricious, and Koster's report fails to demonstrate that the response actions of the EPA were not supported by the administrative record. Therefore, as Defendants have failed to demonstrate on the record that the response actions taken by the EPA and DEP were arbitrary and capricious, this court will grant the Motions for Summary Judgment of the United States and DEP for the response costs incurred to date in cleaning the Site.

Defendants argue that the statute of limitations under HSCA precludes DEP from recovering costs incurred prior to six years from the filing of the Complaint in this action. See 35 Pa. Cons. Stat. § 6020.1114 (providing six year statute of limitations for action to recover response costs from the date those costs are incurred). DEP states in its Motion for Summary Judgment that it seeks to recover response costs under CERCLA for those costs related to the Superfund State Contract and for those costs incurred by DEP related to the temporary provision of bottled drinking water. As DEP seeks its response costs under CERCLA, it states that it only seeks the recovery of legal and oversight costs under HSCA which may not be available under CERCLA. As DEP has not specifically set forth what oversight costs it is seeking pursuant to HSCA, this court will assume that DEP seeks only to recover legal costs under HSCA. Although

§ 507(b) of HSCA does provide for legal costs, these costs are only available "in an action to recover response costs" under HSCA. See 35 Pa. Cons. Stat. § 6020.507(b).[6] Because DEP is recovering its response costs pursuant to CERCLA, it would not be entitled to legal costs under HSCA, and the statute of limitations under HSCA would not apply.

F. Declaratory Judgment

The United States and DEP argue that they are entitled to a declaratory judgment for future response costs associated with the cleanup of the Site. In an action for recovery of costs under § 9607, "the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages." 42 U.S.C. § 9613(g)(2). Under HSCA, "[t]he initial action to recover response costs shall be controlling as to liability in all subsequent actions." 35 Pa. Cons. Stat. § 6020.1114. In accordance with § 113(g)(2) of CERCLA and § 1114 of HSCA, this court will enter a declaratory judgment that Defendants shall be found liable in any future actions filed by the United States or DEP pursuant to CERCLA or HSCA to recover response costs associated with the remediation of the Site.[7]

G. The Removal Order

1. Enforcement of the Removal Order

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[6] Section 507(b) of HSCA provides that "[i]n an action to recover response costs and natural resource damages, the department shall include administrative and legal costs from its initial investigation up to the time that it recovers its costs." 35 Pa. Cons. Stat. § 6020.507(b).

[7] Although DEP did not seek response costs under HSCA in this action, in the interest of judicial economy, this court will enter a declaratory judgment on the issue of liability under HSCA in the event DEP does seek response costs associated with the Site under HSCA in the future.

EPA issued the Removal Order pursuant to § 106(a) which authorizes the EPA to issue an order to a private party after it determines that there may be an "imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of hazardous substances from a facility." 42 U.S.C. § 9606(a). An endangerment is "imminent" if conditions which give rise to it are present, even though the actual harm may not be realized for years. B.F. Goodrich Co. v. Murtha, 697 F. Supp. 89, 96 (D. Conn. 1988). The fact that implementation may take a protracted time does not justify a finding that the threat to public health is any less imminent nor that commencement of the correction process should be delayed. Id. In interpreting identical "imminent and substantial endangerment" language in RCRA, the Third Circuit has held that "[t]here is no doubt . . . that it authorizes the cleanup of a site, even a dormant one, if that action is necessary to abate a present threat to the public health or the environment." United States v. Price, 688 F. 2d 204, 213-14 (3d Cir. 1982).

This court will review the EPA's Removal Order under the standard of judicial review set forth under CERCLA § 113, which is whether, based on the administrative record, EPA's decision to issue the Removal Order was arbitrary, capricious, or otherwise inconsistent with the law. 42 U.S.C. § 9613(j)(2). See United States v. Ottati and Goss, Inc., 900 F.2d 429, 434 (1st Cir. 1990)(where EPA asks a court to enforce a lawful nonarbitrary EPA order, the court must enforce it). Furthermore, the EPA may seek an order directing compliance with its order using the contempt powers of the court as a sanction for non-compliance. Solid State Circuits, Inc. v. United States EPA., 812 F.2d 383, 387 (8th Cir. 1987).

This court concludes that the record contains sufficient evidence to support the EPA's

finding that the Site posed an imminent and substantial endangerment. The ROD concluded that surface soils and sediments at the Site have elevated levels of hazardous substances, and the ground water system, including the potable drinking water supply, contains volatile organic contaminants. Sampling from residential wells also showed elevated levels of contaminants. Finally, the risk assessment performed by Baker/TSA, Inc. concluded that there was a significant risk to human health posed by the soils and groundwater in the vicinity of the Site. Based on the evidence in the ROD, this court concludes that the EPA had a sufficient basis for issuing the Removal Order. Therefore, this court will enforce the Removal Order and require that Defendants comply with the Removal Order under penalty of contempt.

2. Defendants' Motion for Summary Judgment on Claim for Civil Penalties Under § 106(b)(1) of CERCLA

Defendants move for summary judgment on the basis that the claims of the United States for civil penalties for Defendants' alleged failure to comply with the Removal Order is barred by the statute of limitations. Relying on 28 U.S.C. § 2462, Defendants argue that the statute of limitations for any action by the Government for enforcement of a civil penalty is five (5) years after the claim first accrued. Defendants argue that the Government's cause of action accrued on May 20, 1991, the original date set forth in the Removal Order. The United States contends that the cause of action accrued on November 28, 1993, the deadline imposed in the Unilateral Amendment, and it seeks penalties only from that date. The United States argues that the original Removal Order did not require the Defendants to act unless they wished to decontaminate and remove materials from the Site, and it was not until the Unilateral Amendment was issued on September 29, 1993 that the Defendants were required to do

anything. The United States filed its Complaint on September 20, 1996.

This court concludes that the government's cause of action accrued on November 28, 1993. The original Removal Order did "not require the Respondents to act unless they wish to decontaminate and remove salvageable and reusable materials from the Site. Any such decontamination and removal must be done in accordance with the provisions of this Order." (Removal Order, March 21, 1991, ¶ 12.1.) Thus, the Defendants were not required to complete the removal by the original Removal Order, however, if they desired to remove materials, they were required to do so in accordance with the Removal Order. The requirement to complete the removal of materials from the Site was not imposed until the Unilateral Amendment was issued. The United States does not allege that the Defendants did not comply with the Removal Order in the manner in which they removed materials from the Site, but rather, that the Defendants failed to complete the removal of the materials as required by the Unilateral Amendment. Because the Defendants were not required to complete the removal until the Unilateral Amendment was issued, the Government's cause of action based on Defendants' failure to complete the removal did not accrue until November 28, 1993, the deadline imposed by the Unilateral Amendment.[8] Assuming, arguendo, that the statute of limitations for an action brought by the government for civil penalties under CERCLA is five (5) years, this court concludes that the United States filed

[8] Even if this court were to accept Defendants' position that the original Removal Order which became effective April 2, 1991 was enforceable, because Barkman agreed to comply with the Removal Order from the beginning, the earliest date a cause of action would have accrued for the United States would have been April 1, 1992 when Barkman was out of compliance and the EPA refused to grant him another extension. Under this scenario, the United States would also have been well within the statute of limitations in filing their Complaint on September 20, 1996.

the present action well within the statute of limitations.[9] Accordingly, Defendants' Motion for Summary Judgment on the United States's claim for civil penalties under § 106(b)(1) of CERCLA will be denied.

3. Penalties under § 106(b)(1) of CERCLA

Section 106(b) of CERCLA provides that:

> Any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under subsection (a) of this section may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $25,000 for each day in which such violation occurs or such failure to comply continues.

42 U.S.C. § 9606(b)(1). The court has discretion whether to impose a fine under the permissive language of § 106(b). United States v. Lecarreaux, 1992 WL 108816, at *15 (D.N.J. 1992). In exercising this discretion, the Court should assess a penalty which will serve both a specific and general deterrent purpose, deterring future violations by these defendants and similar violations by others. Id. at *15. "Sufficient cause" has been interpreted to mean that the party had a reasonable belief that it was not liable under CERCLA or that the required response action was inconsistent with the national contingency plan. Solid State Circuits, Inc, 812 F.2d at 391 n. 11. A defendant's financial status or ability to pay is not a factor that counsels whether sufficient cause exists. United States v. Lecarreaux, 1991 WL 341191, at *26 (D.N.J. 1991).

Defendants argue that they had sufficient cause for failing to comply with the Removal

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[9] CERCLA does not specifically provide a statute of limitations for the imposition of civil penalties authorized under § 106(b). Defendants submit that in the absence of any provision of CERCLA, that the general statute of limitations for an action by the Government for recovery of fines or penalties applies to any Government claim for civil penalties under CERCLA. Said statute of limitations appears at 28 U.S.C.§ 2462 and provides that such an action must be commenced within five years from the date when the claim first accrued.

Order because they had a reasonable belief that they were not liable and that the remedial response was arbitrary and capricious. Defendants assert that they had two choices: first, they could obey the order, vacate the land, and cease business operations, during which time they would have no income because they could not find a site to relocate their business; or second, they could wait for the EPA to enforce its improper order so that they could show the Court that the EPA acted arbitrarily and capriciously. Simply because Defendants have pursued this litigation and are now before the court arguing that the EPA's actions were arbitrary and capricious does not necessarily prove that they had sufficient cause to fail to comply with the order. In fact, Defendants actions over the past few years speak much louder than their words.

On April 25, 1991, shortly after the original Removal Order was issued, Barkman agreed to comply with the Order. Barkman submitted a work plan which was approved by the EPA, and he began cleaning up the Site. Once Barkman realized that he could not find another location for his business and the EPA refused to grant him another extension, Barkman began to advance the arguments that he may not be liable and that the actions of the EPA were arbitrary and capricious. Even after the Unilateral Amendment was issued, Barkman continued to assert that he was complying with the Order and completing the removal. Barkman told the EPA time and time again for over six years that he was removing materials from the Site. To this day, however, the Site is not clear and Barkman continues his business operations at the Site.

Based on the chain of events and the evidence before the court, this court concludes that Defendants refusal to comply with the Removal Order was based on the fact that Barkman could not relocate his business and he was faced with the prospect of losing his income. Such a basis for failing to comply with the Removal Order does not constitute "sufficient cause".

Furthermore, once Barkman could not find a place to relocate his business, he actively misled the EPA into believing that he was clearing the Site, when he had no intention whatsoever of closing his business and leaving the Site. Therefore, the motion of the United States for the imposition of fines under § 106(b) of CERCLA will be granted and a penalty shall be imposed on the Removal

Order Defendants in the amount of $100 per day from November 28, 1993 through the date of this Order.

III. CONCLUSION

Upon consideration of the papers before the court, this court concludes that Plaintiffs the United States and DEP have provided sufficient evidence of a release of hazardous substances at the Site which caused the United States and DEP to incur response costs associated with the clean-up and remediation of the Site. Defendants have failed to offer sufficient evidence to create a genuine issue of material fact on the issue of their liability under CERCLA and HSCA. Therefore, summary judgment will be granted in favor of the United States and DEP on the issue of liability under CERCLA and HSCA. This court will also enter a declaratory judgment that this finding of liability under CERCLA and HSCA shall be binding in any future actions by the United States and DEP to recover costs associated with the remediation of the Site.

This court also concludes that Defendants have failed to demonstrate on the record that the response actions taken by the EPA and DEP were arbitrary and capricious. Therefore, summary judgment will be granted in favor of the claims of the United States and DEP under CERCLA for the response costs incurred to date in cleaning and remediating the Site in

accordance with the ROD for OU1. Defendants shall be liable for response costs incurred by the United States totaling $7,933,483.36 through March 9, 1998 and response costs incurred by DEP totaling $587,237.66 through September 4, 1998. The United States and DEP may, if appropriate, supplement these costs with any additional response costs associated with the OU1 for the Site through the date of this Order. Any supplemental costs shall be filed within ten (10) days from the date of this Order. Defendants will have ten (10) days to respond, if appropriate, to any additional costs submitted by the United States and DEP. DEP will not be entitled to recover legal costs under HSCA.

Finally, Defendants' Motion for Summary Judgment on the claim of the United States for Civil Penalties under § 106(b)(1) of CERCLA will be denied as said claim is not barred by the statute of limitations, and the court will impose a fine under § 106(b)(1) against Defendants of $100 per day from November 28, 1993 through the date of this Order for the Defendants' willful refusal to comply with the Removal Order without sufficient cause. This court will enforce the Removal Order in all respects and order Defendants to comply with the Removal Order under penalty of contempt.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
Plaintiff,	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 96-6395
ERNEST BARKMAN, GRACE	:	
BARKMAN, ERN-BARK, INC.,	:	
BARK-ERN, INC., and E.B. CORP., INC.	:	
Defendants.	:	

COMMONWEALTH OF	:	
PENNSYLVANIA DEPARTMENT OF	:	
ENVIRONMENTAL PROTECTION	:	
Plaintiff,	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 98-1180
ERNEST BARKMAN, et al.	:	
Defendants.	:	

ORDER

AND NOW, this 17th day of December, 1998, upon consideration of the papers before the court, IT IS HEREBY ORDERED that:

1. The United States of America's Motion to Exclude the Report and Testimony of Defendants' Expert, Wallace C. Koster, is DENIED.

2. Defendants' Motion to Strike the Declarations of Frank Klanchar is GRANTED IN PART as to those portions of the declaration which were not made upon personal knowledge.

3. The United States of America's Motion for Summary Judgment and Enforcement of the EPA's Removal Order is GRANTED. Defendants Ernest Barkman, Grace Barkman, Ern-Bark, Inc., and E.B. Corp., Inc. shall comply with the Removal Order immediately under penalty of contempt.

4. The Pennsylvania Department of Environmental Protection's Motion for Summary Judgment is GRANTED.

5. A declaratory judgment is hereby entered that the court's finding of liability against Defendants under CERCLA and HSCA shall be binding in any future actions by the United States and DEP to recover costs associated with the remediation of the Site.

6. Defendants shall be jointly and severally liable for the response costs incurred to date in cleaning and remediating the Site in accordance with the ROD for OU1. Defendants shall be liable for response costs incurred by the United States totaling $7,933,483.36 through March 9, 1998 and response costs incurred by DEP totaling $587,237.66 through September 4, 1998. EPA and DEP may, if appropriate, supplement these costs with any additional response costs associated with the OU1 for the Site through the date of this Order. Any supplemental costs shall be filed within ten (10) days from the date of this Order. Defendants will have ten (10) days to respond, if appropriate, to any additional costs submitted by the United States and DEP.

7. Defendants' Motion for Summary Judgment on the claim of the United States for Civil Penalties under § 106(b)(1) of CERCLA is DENIED.

8. Defendants Ernest Barkman, Grace Barkman, Ern-Bark, Inc., and E.B. Corp., Inc. shall pay a fine of $100 per day from November 28, 1993 through the date of this Order for their

willful failure to comply with the Removal Order without sufficient cause, said fine totaling $184,500.00.

BY THE COURT:

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CLIFFORD SCOTT GREEN, S.J.